

Washington Law Review

Volume 78 | Number 1

2-1-2003

Is Assent Still a Prerequisite for Contract Formation in Today's E-Conomy?

Melissa Robertson

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>

Digital Part of the [Computer Law Commons](#)
Commons

Network Recommended Citation Logo

Melissa Robertson, Notes and Comments, *Is Assent Still a Prerequisite for Contract Formation in Today's E-Conomy?*, 78 Wash. L. Rev. 265 (2003).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol78/iss1/7>

This Notes and Comments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

IS ASSENT STILL A PREREQUISITE FOR CONTRACT FORMATION IN TODAY'S E-CONOMY?

Melissa Robertson

Abstract: A browse-wrap agreement is an online contract that governs the use of a Web site but does not require users of the site to affirmatively agree to the terms and conditions of the contract. The terms of a browse-wrap agreement are accessible to the user only by clicking on an Internet link, often inconspicuously located at the bottom of a Web page, marked "Terms and Conditions." Browse-wrap agreements purport to bind users to these terms and conditions when the user merely performs a function of the Web site, such as submitting a query on the site's database or downloading software. Despite the prevalent use of browse-wrap agreements, courts are just beginning to consider their enforceability. To date, four federal district courts have addressed the issue. Each court has approached the issue of contract formation differently and has reached a different result. Courts should refuse to enforce browse-wrap agreements. Users do not always have adequate notice that using a Web site binds them to the terms and conditions of a browse-wrap. Even if the Web site does provide notice to users that such terms and conditions exist, users are not given the opportunity to adequately manifest their assent to such terms. Although courts must be flexible as contracts evolve to accommodate electronic commerce, browse-wrap agreements stray too far from the basic contractual principles of notice and assent. Accordingly, courts should not enforce them.

Imagine you are browsing the Internet from your home computer.¹ You are searching for the latest version of a popular software program that allows you to download and play music from the Internet. You find the software and proceed to download it. Soon after, you learn that the software has infected your computer with a virus that has virtually destroyed your computer's hard drive. You sue the software company for damages. The company moves to stay the proceedings and compel arbitration in Florida pursuant to an arbitration clause contained in the terms and conditions of its Web site. You do not remember clicking on an icon that says "I Agree" or otherwise forming a contract on the Web site. In fact, you never even saw a list of terms and conditions on the Web site. You learn that the terms and conditions of the site are hidden behind a link at the bottom of the Web site, far below the icon which allowed you to download the software. Next to this otherwise unmarked link, there is a small statement that says, "By using this Web site you agree to be bound by our Terms and Conditions." But you never assented to arbitration in Florida. Surely a court of law would never bind you to the terms and conditions of a Web site when you did not even know the terms existed—would it? It just might.

1. Hypothetical created by the author.

Courts should enforce online contracts only where the consumer has adequate notice of the terms and conditions, the user affirmatively assents to be bound by such terms, and the terms being invoked are conscionable. Since the advent of the Internet, parties have been contracting online.² Because the validity of online contracts is unsettled, many online businesses require users to affirmatively agree to express contracts called “click-wrap” agreements to govern the use of their Web sites.³ However, many other businesses rely on online contracts called “browse-wrap” agreements⁴ that purport to bind users even though they do not require users of the site to perform an affirmative act, or even know about the contract.⁵ Web sites with browse-wrap agreements usually display a notice on the site that states that using the Web site binds users to the terms and conditions of the site.⁶ This announcement is usually followed by a link to the site’s full text of terms and conditions, which may or may not be on the same Web page as the notice.⁷ Despite the prevalent use of browse-wrap agreements, courts have just recently begun to consider the enforceability of such contracts.⁸

The law regarding the enforceability of browse-wrap agreements is unsettled.⁹ To date, four federal district courts have addressed the enforceability of browse-wrap agreements.¹⁰ Prior to 2000, no court had

2. See Kirk R. Ruthenberg, *On-line Contracting, Click Through Transactions and Electronic Signatures—Is Your Contract Worth the Paper it Isn't Written On?*, 1, at <http://www.sonnenschein.com/website/website.nsf> (last visited Dec. 17, 2002).

3. See Mark H. Wildasin, *Shrink Wrap, Click Wrap, and Now Browse Wrap: Did You Just Make a Contract?*, METROPOLITAN CORPORATE COUNSEL, Oct. 2001, at 13. Click-wrap agreements are online contracts that contain a Web site’s terms and conditions. A user must click an icon that states “I Agree” or a similar phrase of agreement to indicate assent to the terms and conditions of the site.

4. Browse-wrap agreements are also called “web-wrap” or “browse-through” agreements.

5. See Wildasin, *supra* note 3, at 13.

6. See *id.*

7. *Id.*

8. See *id.*

9. See *id.*

10. See *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 596 (S.D.N.Y. 2001) (refusing to enforce arbitration clause within defendant’s browse-wrap agreement because plaintiffs did not adequately manifest their assent to the agreement); *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 248 (S.D.N.Y. 2000) (granting preliminary injunction against defendant after finding that defendant manifested assent to plaintiff’s browse-wrap agreement); *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 982 (E.D. Cal. 2000) (denying defendant’s motion to dismiss after finding that plaintiff’s browse-wrap agreement “may be” valid and enforceable); *Ticketmaster Corp. v. Tickets.Com, Inc.*, No. CV99-7654-HLH (BQRx), 2000 U.S. Dist. LEXIS 12987, at *18 (C.D. Cal. Aug. 10, 2000), *aff’d*, 248 F.3d 1173 (9th Cir. 2001) (denying plaintiff’s motion for preliminary injunction after finding that plaintiff did not provide sufficient proof of defendant’s agreement to plaintiff’s browse-wrap agreement).

addressed the issue.¹¹ Initially, courts did not definitively hold whether terms within browse-wrap agreements were enforceable.¹² One court noted that users of a Web site with a browse-wrap agreement may or may not understand that they are bound by the terms and conditions of the site merely by visiting it.¹³ However, that court refused to declare the browse-wrap agreement unenforceable.¹⁴ The apparent enforceability of analogous contracts prevalent in the software industry, such as shrink-wrap¹⁵ and click-wrap¹⁶ licenses,¹⁷ suggested that courts would enforce terms within browse-wrap agreements as long as they were not unconscionable.¹⁸ In *Register.com, Inc. v. Verio, Inc.*,¹⁹ a federal district court confirmed this assumption by enforcing a term within a browse-wrap agreement.²⁰ However, a recent federal district court opinion, *Specht v. Netscape Communications Corp.*,²¹ places the enforceability of browse-wrap agreements into question.²² In *Specht*, the court held browse-wrap agreements to be unenforceable because they do not require users to affirmatively assent to the terms and conditions; and without assent, no valid contract exists.²³

This Comment argues that courts should not enforce browse-wrap agreements. Rather, courts should enforce online contracts only where users have adequate notice of the terms and conditions and affirmatively agree to be bound by such terms. Accordingly, assuming that the terms

11. See *Pollstar*, 170 F. Supp. 2d at 981.

12. See, e.g., *id.* at 982; *Ticketmaster Corp.*, 2000 U.S. Dist. LEXIS 12987, at *18.

13. See *Pollstar*, 170 F. Supp. 2d at 981.

14. *Id.* at 982.

15. A shrink-wrap agreement is an unsigned license agreement commonly used in the software industry. Shrink-wrap agreements generally come inside a software product's packaging or are displayed on a user's computer screen when the user installs the software on his or her computer. See *infra* Part II.A.

16. See *infra* Part II.B.

17. In the context of software contracts, the terms "license," "contract," and "agreement" are often used interchangeably. See, e.g., JANE K. WINN & BENJAMIN WRIGHT, *THE LAW OF ELECTRONIC COMMERCE*, § 6.02[A], at 6-3-6-7 (4th ed. 2001).

18. See WINN, *supra* note 17, § 6.01, at 6-2. ("[I]t seems likely that courts will uphold clickwrap and webwrap contracts based on the Internet display of a standardized form contract by a vendor and some act on the part of the accepting party indicating acceptance of the offered terms. It will be more difficult to predict whether each provision of such a standard form contract will be enforced, however.").

19. 126 F. Supp. 2d 238 (S.D.N.Y. 2000).

20. See *id.* at 248.

21. 150 F. Supp. 2d 585 (S.D.N.Y. 2001).

22. See *id.* at 596; see also Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 489 (2002).

23. See *Specht*, 150 F. Supp. 2d at 596.

invoked are conscionable, courts should enforce click-wrap agreements because they provide users with adequate notice and require them to affirmatively assent to the terms. Part I of this Comment establishes contract law principles that are relevant to determining whether browse-wrap agreements are enforceable. Part II examines the enforceability of analogous contracts such as shrink-wrap and click-wrap agreements, as well as online contracts under the Uniform Computer Information Transactions Act.²⁴ Part III of this Comment analyzes the four federal district court cases that have addressed the enforceability of browse-wrap agreements. Part IV argues that courts should not enforce browse-wrap agreements because they do not provide users with adequate notice of the terms and conditions of the agreement or require users to adequately manifest assent. Further, Part IV argues that courts should enforce click-wrap agreements because they do provide users with adequate notice and require users to manifest assent. This Comment concludes that click-wrap agreements strike an essential balance between facilitating online business and ensuring that users are not bound by contracts of which they had no knowledge.

I. CONTRACT LAW PRINCIPLES RELEVANT TO THE ENFORCEABILITY OF ONLINE CONTRACTS

A contract, in its simplest terms, is the binding promise of one party to another.²⁵ Contract law generally requires three elements to create a binding contract: offer, acceptance, and consideration.²⁶ The *Restatement (Second) of Contracts* defines a contract as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”²⁷ At

24. Unif. Computer Info. Transactions Act, available at <http://www.law.upenn.edu/bll/ulc/ucita/ucita01.htm> (last visited Dec. 17, 2002) [hereinafter U.C.I.T.A.]. Several scholars contend that courts should not enforce shrink-wrap agreements because they are unfair to consumers. This argument is beyond the scope of this Comment. For a general discussion of policy reasons against enforcement of shrink-wrap agreements, see Jane M. Rolling, *The UCC Under Wraps: Exposing the Need for More Notice to Consumers of Computer Software with Shrinkwrapped Licenses*, 104 COM. L.J. 197 (1999). Scholars also contend that courts should not enforce click-wrap agreements for similar reasons. For a discussion of policy reasons against enforcement of click-wrap agreements, see Roger E. Schechter, *The Unfairness of Click-on Software Licenses*, 46 WAYNE L. REV. 1735 (2000).

25. See E. ALLAN FARNSWORTH, *CONTRACTS* § 1.1, at 3 (3d ed. 1999).

26. Zachary M. Harrison, Note, *Just Click Here: Article 2B's Failure to Guarantee Adequate Manifestation of Assent in Click-Wrap Contracts*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 907, 914 (1998).

27. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979).

common law, a contract was formed when one party accepted another party's offer.²⁸ The *Restatement* provides that "the manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties."²⁹ The offeree's acceptance, which may take the form of a return promise or act, creates a binding contract.³⁰

Contract law has evolved over the years to accommodate modern business practices.³¹ For example, Article 2 of the Uniform Commercial Code (UCC) loosens the requirements of contract formation such that a contract may be formed "in any manner sufficient to show agreement."³² However, the terms of a contract will not be enforced if a court finds them to be unconscionable, regardless of the manner in which the contract was formed.³³ For example, courts will generally enforce standardized form contracts because parties have a duty to read the contract before agreeing to its terms,³⁴ but they will invalidate the terms of the contract if they are unconscionable.³⁵

Because the UCC substantially loosens the requirements necessary to form a valid contract, parties may manifest their assent electronically.³⁶ UCC § 2-204 provides that a contract may be made "in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."³⁷ Further, UCC § 2-206 provides, "an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances."³⁸ Courts have subsequently interpreted UCC §§ 2-204 and 2-206 to allow parties to create enforceable contracts over the Internet.³⁹ However, there are many issues regarding the enforceability of online contracts. For example, what conduct is required by the parties to manifest their assent to online contracts? How do procedural and substantive unconscionability affect the enforceability of terms within

28. See FARNSWORTH, *supra* note 25, § 3.3, at 113.

29. RESTATEMENT (SECOND) OF CONTRACTS § 22(1).

30. See FARNSWORTH, *supra* note 25, § 3.3, at 113.

31. See Wildasin, *supra* note 3, at 13.

32. *Id.*

33. U.C.C. § 2-302 (2000).

34. See FARNSWORTH, *supra* note 25, § 4.26, at 297.

35. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 448-49 (D.C. Cir. 1965).

36. See WINN, *supra* note 17, § 6.02, at 6-3.

37. U.C.C. § 2-204(1) (2000).

38. *Id.* § 2-206(1)(a).

39. See GEORGE B. DELTA & JEFFREY H. MATSUURA, *LAW OF THE INTERNET* § 10.07 (2d ed. 2002).

online contracts? And how does the enforceability of standardized form contracts and the duty to read apply to online contracts? This Comment will now discuss how the issues of assent, unconscionability, the enforceability of standardized form contracts and the duty to read relate to the enforceability of online contracts.

A. Assent

To create an enforceable contract, a party must assent to its terms.⁴⁰ However, it is not entirely clear what conduct is sufficient to adequately manifest a user's assent to the terms and conditions posted on a Web site. Several courts have expressed concern over a user's ability to adequately manifest assent to online contracts.⁴¹ According to E. Allan Farnsworth, "[s]ince it is difficult for a workable system of contract law to take account of assent unless there has been an overt expression of it, courts have required that assent to the formation of a contract be manifested in some way, by words or other conduct, if it is to be effective."⁴² Courts, however, are just now determining what conduct is required from a user to create an enforceable online contract.⁴³ Must a user click on an icon that says "I Agree?" Or is it enough that a user downloads software or submits a query on a Web site that contains a notice that says "By using this site you agree to be bound by our terms and conditions?" Must the user actually read the terms and conditions of the site? And does the user even have to see the link to the terms and conditions? These questions remain largely unanswered.

Whether a court finds that a user manifested assent to an online contract may depend largely on whether the court applies a subjective or objective theory of assent. Under the subjective theory, a court examines the actual intentions of the parties and requires, as often stated, a "meeting of the minds."⁴⁴ If a party did not specifically intend to assent to a particular term, then that term is not enforceable.⁴⁵ However, under the objective theory of assent, a court looks only to "the external or objective appearance of the parties' intentions as manifested by their

40. FARNSWORTH, *supra* note 25, § 3.1, at 110.

41. *See, e.g.,* Specht v. Netscape Communications Corp., 150 F. Supp. 2d 585, 596 (S.D.N.Y. 2001); *see also* Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000).

42. FARNSWORTH, *supra* note 25, § 3.1, at 110.

43. *See* Hillman, *supra* note 22, at 488–89.

44. *See* FARNSWORTH, *supra* note 25, § 3.6, at 116–17.

45. *See id.*

actions.”⁴⁶ Therefore, even if a party did not intend to assent to a particular term, a court will enforce it if a reasonable person would conclude that the party intended to assent by their words or conduct.⁴⁷ Although the subjective theory of assent is reflected in the *Restatement of Contracts*,⁴⁸ the objective theory is most commonly employed by the courts.⁴⁹ Generally speaking, there is no contract without assent, but once the objective manifestations of assent are present, the author is bound. There are many unanswered questions regarding assent and the enforceability of online contracts.

B. Unconscionability

Because online contracts are unilaterally imposed on the user, these contracts may include terms that are materially unfavorable or unfair to the user.⁵⁰ Depending on the circumstances, a court may find such terms to be unconscionable.⁵¹ The equitable doctrine of unconscionability was codified in UCC § 2-302.⁵² It provides that if a court finds a contract clause to be unconscionable, the court can refuse to enforce the contract entirely, refuse to enforce only the unconscionable clause, or limit the application of the clause so as to avoid an unconscionable result.⁵³

Courts generally recognize two kinds of unconscionability: “procedural” and “substantive.”⁵⁴ Procedural unconscionability relates to how a term becomes part of a contract.⁵⁵ For example, procedural unconscionability may involve inconspicuous or unintelligible print, a lack of opportunity to review the terms, or an inability to ask questions regarding the terms and meanings of specific clauses.⁵⁶ Procedural unconscionability may also involve a unilaterally imposed standardized form contract by a party with far greater bargaining power.⁵⁷ However,

46. *Id.*

47. *See id.*

48. *See* RESTATEMENT (SECOND) OF CONTRACTS, §§ 210, 212, 215 cmt. b (1979).

49. FARNSWORTH, *supra* note 25, § 3.6, at 117.

50. *See* Hillman, *supra* note 22, at 468.

51. *See* Hillman, *supra* note 22, at 490.

52. *See* UCC § 2-302 (2000).

53. *See id.*

54. For an often cited, often praised, and often criticized discussion of substantive and procedural unconscionability, see generally Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

55. *See* JOHN P. DAWSON ET AL., CONTRACTS 694 (7th ed. 1998).

56. *See* FARNSWORTH, *supra* note 25, § 4.28, at 311–12.

57. *Id.*

while disparity in bargaining power or a standardized form contract alone will not render terms within the contract unconscionable, these factors may be significant when considered together with the substantive clauses of the contract.⁵⁸

Substantive unconscionability refers to contracts or terms that are oppressive or overly harsh.⁵⁹ In determining whether a contract is substantively unconscionable, courts have looked at several factors.⁶⁰ These include provisions that deprive one party of the benefits he or she is entitled to receive under the contract and provisions that bear no reasonable relation to the business risk involved.⁶¹ Further, courts have considered whether there is an unreasonable disparity in the cost and the selling price and whether the contract creates an unreasonable advantage for one party without producing an adequate benefit to the disadvantaged party.⁶² Although the presence of one of these factors does not necessarily mean that a court will invalidate the contract as unconscionable, courts will generally invalidate the contract if both procedural and substantive unconscionability exist.⁶³

C. *Standardized Form Contracts and the Duty to Read*

Although contracts scholars have argued that standardized form contracts are procedurally unconscionable, courts routinely enforce such contracts because parties have a common law duty to read.⁶⁴ Standardized form contracts are regularly upheld by courts even if one party did not read or understand the terms of the contract.⁶⁵ Courts will generally enforce such contracts even if the terms of the contract are preprinted by one party and presented to the other party on a “take it or leave it” basis.⁶⁶ Courts have viewed online contracts as a novel type of standardized form contract.⁶⁷

58. *See id.* at 312.

59. *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 9.40, at 373 (4th ed. 1998); *see also* DAWSON, *supra* note 55, at 694.

60. *See* FARNSWORTH, *supra* note 25, § 4.28, at 311.

61. *See id.*

62. *See* CALAMARI & PERILLO, *supra* note 59, § 9.40, at 373.

63. *Id.*

64. *See id.* § 9.42, at 377.

65. *See id.*

66. *See id.*; *see also* *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594–95 (1991) (holding a forum selection clause printed on the back of a cruise ship ticket reasonable and enforceable because such terms reduce litigation costs, insurance costs, and passenger fares, despite the fact enforcement of the clause effectively denied plaintiff’s day in court). For a discussion of the enforceability of forum selection clauses within online contracts, *see* Kaustuv M. Das, Comment, *Forum-Selection*

The enforceability of form contracts is typically justified by the common law rule that a party has a duty to read a contract.⁶⁸ Failing to read the terms of a contract does not excuse a party from being legally obligated to fulfill the contract.⁶⁹ The exception to this rule arises when the disputed terms are not sufficiently called to the attention of the adhering party.⁷⁰ Determining whether the terms were sufficiently called to the attention of the adhering party depends on whether a reasonable person under the circumstances would understand that the disputed terms were part of the binding contract.⁷¹

Although courts will generally enforce terms within standardized form contracts, they have made exceptions to the rule in limited circumstances where the terms of the contract were unfair under the circumstances.⁷² Courts can invalidate such contracts in whole or in part.⁷³ Three grounds exist for courts to invalidate terms within a standardized contract: (1) the adhering party did not truly assent to a particular term; (2) the term contravenes public policy and is therefore void; and (3) the term is unconscionable.⁷⁴

In *Williams v. Walker-Thomas Furniture Co.*,⁷⁵ the federal Court of Appeals for the D.C. Circuit considered the enforceability of a standardized form contract and concluded that, because the adhering party likely did not know of the grossly unfair terms within the preprinted form contract, the trial court erred in failing to determine whether the doctrine of unconscionability was applicable.⁷⁶ The court explained that when a party of little bargaining power signs an unconscionable contract without having any knowledge of its terms, the party has not truly assented to be bound by such terms.⁷⁷ Under such circumstances, the court stated, the traditional duty to read rule should be

Clauses in Consumer Clickwrap and Browsewrap Agreements and the "Reasonably Communicated" Test, 77 WASH. L. REV. 481 (2002).

67. WINN, *supra* note 17, § 6.02, at 6-3.

68. See CALAMARI & PERILLO, *supra* note 59, § 9.41, at 377.

69. See *id.*

70. See *id.* § 9.42, at 378.

71. See *id.*

72. See *id.* § 9.41, at 377.

73. See FARNSWORTH, *supra* note 25, § 4.26, at 309.

74. See CALAMARI & PERILLO, *supra* note 59, § 9.43, at 382-83.

75. 350 F.2d 445, 449 (D.C. Cir. 1965) (remanding to trial court to determine whether the doctrine of unconscionability applied where a clause in an installment sales agreement resulted in repossession of all items purchased from the store when the purchaser fell behind on payment of one item).

76. See *id.*

77. See *id.*

abandoned to avoid an unconscionable result.⁷⁸ Additionally, a court may find a term buried in a form contract to be unenforceable if a reasonable person who has carefully read the contract could not be expected to understand the term.⁷⁹ The odds of unenforceability are greater if the problematic term is in an inconspicuous place, such as the back of a paper form or in fine print.⁸⁰

If a court finds that a party drafting a contract has included terms that are egregiously one-sided, the court may construe the term in the manner most favorable to the adhering party and most unfavorable to the drafting party, without actually invalidating the term.⁸¹ Courts may also follow the *Restatement (Second) of Contracts* § 211(3), which suggests invalidating a specific term of the contract when “the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term”⁸²

Although standardized form contracts raise a number of issues regarding assent and fairness, their efficiency and convenience have made them a significant and inescapable aspect of modern life.⁸³ Many scholars have argued that a party never truly assents to all the terms within standardized form contracts.⁸⁴ Most notably, Karl Llewellyn, a principal drafter of the UCC, argued that a party may give a “blanket assent” to reasonable terms within a standardized form contract, but that the party cannot truly assent to anything but the few dickered terms of the contract.⁸⁵ Llewellyn concluded that as long as the terms contained in a standardized form contract are not unfair in presentation or substance, courts should enforce them if the parties gave a blanket assent to be bound by such terms.⁸⁶

Another contracts scholar, Todd D. Rakoff, has argued that because parties do not truly assent to standardized form terms, proponents of such forms can not argue that standardized form contracts must be enforced to

78. See *id.* at 450.

79. WINN, *supra* note 17, § 6.02[A], at 6-3.

80. See FARNSWORTH, *supra* note 25, § 4.26, at 298.

81. See *id.* § 7.11, at 473.

82. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1979).

83. See Hillman, *supra* note 22, at 435-36.

84. See generally Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1931); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174 (1983).

85. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 370 (1960).

86. See Hillman, *supra* note 22, at 455.

uphold the principle of “freedom of contract.”⁸⁷ He contended that “[o]nce it is recognized that contracts of adhesion arise from the matrix of organizational hierarchy, the argument for enforcement of form terms as a recognition of ‘freedom of contract’ in its usual sense is unsupportable.”⁸⁸ Regardless, courts have the tools to keep the drafters of standardized form contracts in check.

II. THE ENFORCEABILITY OF SHRINK-WRAP AND CLICK-WRAP AGREEMENTS

When presented with the question of whether terms within browse-wrap agreements are enforceable, courts have found an absence of authority directly on point. Searching for a useful analogy, courts have looked to cases addressing the enforceability of shrink-wrap and click-wrap agreements for guidance.⁸⁹ Courts generally enforce terms in both shrink-wrap⁹⁰ and click-wrap agreements.⁹¹ The Uniform Computer Information Transaction Act (UCITA), a model law intending to provide guidance on the enforceability of electronic contracts, provides that shrink-wrap and click-wrap agreements are enforceable as long as the user has a reasonable opportunity to review the terms and manifests his or her assent in a manner sufficient to show agreement.⁹²

A. *Shrink-Wrap Agreements*

A shrink-wrap agreement is an unsigned license agreement commonly used in the software industry.⁹³ Shrink-wrap agreements generally come in two forms. The first includes the terms and conditions of a product inside the sealed plastic of the software’s packaging; hence the name, “shrink-wrap agreement.”⁹⁴ The second displays the terms and conditions on a user’s computer screen when the user installs the software program.⁹⁵ Both types contain a notice to the user that using the product

87. Rakoff, *supra* note 84, at 1237.

88. *Id.*

89. *See, e.g.,* Specht v. Netscape Communications Corp., 150 F. Supp. 2d 585, 594–95 (S.D.N.Y. 2001); *see also* Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000).

90. *See* Wildasin, *supra* note 3, at 13.

91. *See* WINN, *supra* note 17, § 6.02[A], at 6-7–6-8.

92. *See* DELTA, *supra* note 39, § 10.07, at 10-64.1–10-64.2.

93. *See* Wildasin, *supra* note 3, at 13.

94. *See id.*

95. *See id.*

or keeping the product beyond a certain time period binds the user to the terms and conditions of the product.⁹⁶

In the early 1990s, courts considering the enforceability of shrink-wrap agreements declined to enforce them on the grounds that they constituted "additional terms" not part of the original contract.⁹⁷ Under UCC § 2-207, such additional terms required express consent beyond merely opening the package and retaining the product for longer than a specified time.⁹⁸ Accordingly, a user merely opening a package or viewing terms when starting up a software program did not constitute express assent to the terms of the shrink-wrap.⁹⁹ Without assent, no valid contract existed.

However, a new trend emerged in enforcing shrink-wrap agreements in 1996 with the seminal case *ProCD, Inc. v. Zeidenberg*.¹⁰⁰ In *ProCD*, the Seventh Circuit held that shrink-wrap agreements are enforceable unless their terms are objectionable on grounds applicable to contracts in general, such as if they violate a rule of positive law or are unconscionable.¹⁰¹ The shrink-wrap agreement at issue in *ProCD* came inside the product's packaging with a notice on the outside of the package requiring the user to review all terms and conditions within the agreement.¹⁰² The notice further stated that if the buyer did not wish to be bound by the terms, the buyer may return the product for a full refund. If the buyer did not return the product, the buyer presumably agreed to be bound by the terms of the shrink-wrap agreement.¹⁰³ In holding such terms to be enforceable, the *ProCD* court applied UCC § 2-204, which allows a contract for the sale of goods to be made in any manner sufficient to show agreement, including conduct by both parties.¹⁰⁴ The Seventh Circuit concluded that opening a package and retaining the product constituted acts sufficient to demonstrate assent.¹⁰⁵ Since the *ProCD* decision, many courts, both federal and state, have relied on the

96. *See id.*

97. *See* WINN, *supra* note 17, § 6.02[A], at 6-5.

98. *See* Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91, 97 (3d Cir. 1991). For further discussion of UCC § 2-207 as applied to shrink-wrap licenses, see William H. Danne, Jr., Annotation, *What are Additional Terms Materially Altering Contract within the Meaning of UCC § 2-207(2)(b)*, 72 A.L.R.3d 479, § 6 (Supp. 2002).

99. *See* Step-Saver Data Sys., Inc., 939 F.2d at 99.

100. 86 F.3d 1447 (7th Cir. 1996).

101. *Id.* at 1449.

102. *Id.* at 1450.

103. *See id.* at 1452-53.

104. *See id.* at 1452.

105. *See id.* at 1452-53.

Seventh Circuit's reasoning in *ProCD* to enforce similar shrink-wrap agreements.¹⁰⁶

B. Click-Wrap Agreements

Courts have relied on the same line of reasoning in *ProCD* to enforce click-wrap agreements.¹⁰⁷ Click-wrap agreements, which acquired their name from their similarity to shrink-wrap agreements, are electronic contracts that contain a Web site's terms and conditions.¹⁰⁸ To form a click-wrap agreement, a user "clicks" on an icon that states "I Agree" or a similar phrase of assent.¹⁰⁹ The user may then proceed with the desired action on the Web site, such as downloading software or searching the site's database.¹¹⁰

Although this area of law is not yet entirely settled, the few courts that have addressed the validity of click-wrap agreements have found them to be enforceable when the user had an opportunity to review the terms and the terms were not unconscionable.¹¹¹ According to the UCC, a user may agree to be bound by a contract in any manner sufficient to show agreement, and courts have generally found that clicking on an icon that says "I Agree" or a similar phrase of assent is sufficient to demonstrate agreement to be bound by the terms.¹¹²

106. See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997) (holding that, because the plaintiffs retained a computer beyond the thirty day period specified on the computer's box, they assented to the terms contained inside the box, including the arbitration clause at issue); *Mortenson Co. v. Timberline Software Corp.*, 140 Wash. 2d 568, 583–84, 998 P.2d 305, 313 (2000) (holding that a limitation of liability in a license agreement contained in software packaging was conscionable and enforceable even though it denied plaintiff from recovering consequential damages); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 571 (N.Y. App. Div. 1998) (holding that plaintiffs manifested their acceptance to the terms contained inside a computer's box when they retained the computer beyond the specified thirty day period). But see *Klocek v. Gateway, Inc.*, 104 F. Supp. 1332, 1341 (D. Kan. 2000) (denying defendant Gateway's motion to dismiss because the court found that retaining a computer beyond the specified five day period was not sufficient to demonstrate assent to defendant's arbitration clause, which was in defendant's shrink-wrap agreement).

107. See Hillman, *supra* note 22, at 487–88.

108. See *id.*

109. See *id.*

110. See *id.*

111. See DELTA, *supra* note 39, § 10.05, at 10-57–10-58.

112. See, e.g., *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1260 (6th Cir. 1996) (finding the click-wrap agreement between plaintiff, an Ohio-based Internet service provider, and defendant, a customer from Texas, to be a valid contract; therefore, defendant had sufficient minimum contacts with Ohio for an Ohio district court to assert personal jurisdiction); *In re RealNetworks, Inc., Privacy Litig.*, No. 00 C 1366, 2000 U.S. Dist. LEXIS 6584, at *21 (N.D. Ill. May 8, 2000) (rejecting an intervenor's arguments that an arbitration clause within a click-wrap agreement is

C. The Enforceability of Online Contracts Under UCITA

Recognizing the lack of uniformity in the case law regarding transactions in the computer industry, including the enforceability of software licenses and online contracts, the National Conference of Commissioners on Uniform State Laws (NCCUSL) formed a committee in March of 1994 to draft a new UCC Article 2B to govern these transactions.¹¹³ The committee met numerous times between 1994 and 1999, attempting to meet the divergent requests of both consumer groups and copyright industries.¹¹⁴ After failing to finalize a new Article 2B, the NCCUSL created a model law, the UCITA in 1999.¹¹⁵ According to one commentator, “[t]he essence of UCITA . . . is that it is a commercial contract law that provides a framework for forming software [and online] contracts, much as the UCC provided the framework for contracts to purchase and sell goods.”¹¹⁶ Although UCITA has only been adopted in a few jurisdictions,¹¹⁷ it is important to consider because courts may still look to it for guidance.¹¹⁸

UCITA contains provisions regarding the enforceability of electronic contracts.¹¹⁹ It champions a “freedom of contract” approach to electronic contracting and generally favors the drafters of standardized form contracts.¹²⁰ The Act reflects the same line of reasoning employed by the Seventh Circuit in *ProCD*. UCITA maintains that shrink-wrap and click-wrap agreements are generally enforceable, as long as the agreements meet basic requirements regarding the user’s opportunity to review the terms and conditions and manifest their assent to be bound.¹²¹ Although UCITA does not specifically consider browse-wrap agreements, it lays

unenforceable); *Hotmail Corp. v. Van Money Pie Inc.*, No. C98-20064 JW, U.S. Dist. LEXIS 10729, at *16-17 (N.D. Cal. Apr. 16, 1998) (granting a preliminary injunction ordering defendant users to stop using plaintiff email provider’s service for transmitting unsolicited email pursuant to a clause prohibiting such acts in plaintiff’s click-wrap agreement); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 533 (N.J. Super. Ct. App. Div. 1999) (affirming trial court’s dismissal of plaintiffs’ claims pursuant to a forum selection clause in defendant’s click-wrap agreement); *Groff v. America Online, Inc.*, No. PC 97-0331, 1998 R.I. Super. LEXIS 46, at *16 (R.I. Super. Ct. May 27, 1998) (dismissing plaintiff’s complaint pursuant to a choice of law clause in defendant’s click-wrap agreement).

113. See Harrison, *supra* note 26, at 929.

114. See *id.*; see also WINN, *supra* note 17, § 6.01, at 6-2.

115. See WINN, *supra* note 17, § 6.01, at 6-2.

116. See DELTA, *supra* note 39, § 10.07, at 10-64.1.

117. See generally UCITA Online, *What’s Happening to UCITA in the States*, at <http://www.ucitaonline.com/whathap.html> (last visited Oct. 22, 2002).

118. See WINN, *supra* note 17, § 6.01, at 6-2.

119. See *id.*

120. See *id.*

121. DELTA, *supra* note 39, § 10.07, at 10-64.1–10-64.2.

out basic requirements for the enforceability of online contracts. UCITA explicitly contrasts its example of an enforceable online agreement with an online contract “that places the terms and conditions of the agreement behind jumplinks labeled ‘terms and conditions’ or ‘legal’ and is tucked unobtrusively at the bottom of the [Web] page, where they are unlikely to be noticed by any but the most cautious or dilatory user.”¹²²

UCITA requires that electronic contracts provide users with an opportunity to review the terms and conditions of the contract.¹²³ According to a comment to UCITA, “[a]n opportunity to review requires that the record be made available in a manner that ought to call it to the attention of a reasonable person and in a form that readily permits review.”¹²⁴ Winn and Wright contrast a format that meets this requirement, e.g., clearly marked terms and conditions prominently displayed on a Web site, with a Web interface that hides terms and conditions behind hyperlinks at the bottom of a Web page that the user must scroll down to see.¹²⁵ Many terms and conditions, such as warranty disclaimers, must be displayed conspicuously.¹²⁶ However, the user does not actually have to review the terms and conditions to create an enforceable contract.¹²⁷ This rule is consistent with the duty to read standardized form contracts.

UCITA also contains provisions intended to clarify what constitutes manifestation of assent to online contracts.¹²⁸ With respect to the enforceability of click-wrap agreements, UCITA established a bright-line rule:¹²⁹ if a user must click on an icon that states “I Agree” two times to

122. WINN, *supra* note 17, § 6.02[A], at 6-8, n.28.

123. DELTA, *supra* note 39, § 10.07, at 10-64.2.

124. U.C.I.T.A. § 112, *cited in* WINN, *supra* note 17, § 6.02[A], at 6-8-6-9, n. 28.

125. WINN, *supra* note 17, § 6.02[A], at 6-8-6-9, n. 28.

126. U.C.I.T.A. § 102(a)(14), *reprinted in* WINN, *supra* note 17, § 6.04[A], at 6-27-6-28, n.127:

Conspicuous terms include the following:

(A) with respect to a person:

(i) a heading in capitals in a size equal to or greater than, or in contrasting type, font, or color to, the surrounding text;

(ii) language in the body of a record or display in larger or other contrasting type, font or color or set off from the surrounding text by symbols or other marks that draw attention to the language; and

(iii) a term prominently referenced in an electronic record or display which is readily accessible or reviewable from the record or display

Id.

127. WINN, *supra* note 17, § 6.02[A], at 6-3.

128. *See id.* § 5.08[C], at 5-55.

129. A critic of this rule has argued that creating a bright-line rule for click-wraps is premature at best and misleading at worst. *See id.*

get through a contract formation interface, then the user has manifested assent to the terms and conditions of the click-wrap.¹³⁰ For other software contracts, UCITA established the rule that a user has manifested assent if that person either: (1) "authenticates a record",¹³¹ or (2) *intentionally* engages in conduct with reason to know that the other party will infer assent from that conduct, *provided that person has knowledge of the contents of the record*, or was given a reasonable opportunity to review it.¹³² In sum, courts have enforced shrink-wrap and click-wrap agreements and UCITA provides that these contracts should be enforced as long as users have a reasonable opportunity to review the terms and conditions of the contracts and manifest their assent in a manner sufficient to show agreement.

III. FEDERAL COURTS HAVE REACHED CONFLICTING CONCLUSIONS REGARDING THE ENFORCEABILITY OF BROWSE-WRAP AGREEMENTS

Although four federal district courts addressing the enforceability of browse-wrap agreements have turned to the Seventh Circuit's decision in *ProCD* for guidance, they have not all reached the same conclusion.¹³³ Two courts reasoned that browse-wrap agreements should be enforced as long as the user has demonstrated assent.¹³⁴ For example, a user could indicate sufficient intent to be bound by downloading software from the Web site, searching the Web site's database, or by accessing a site that

130. See *id.*; see also *Groff v. America Online*, No. PC 97-0331, 1998 R.I. Super. LEXIS 46, at *13 (R.I. Super. Ct. May 27, 1998) (applying this "two clicks" rule prior to the enactment of UCITA to conclude that the plaintiff user had formed a valid contract and was therefore bound by defendant's forum-selection clause).

131. Legislation such as the Uniform Electronic Transactions Act (UETA) and the Electronic Signatures in Global and National Commerce Act (E-SIGN) establish useful guidelines for electronic record authentication. UETA Online, at <http://www.yetaonline.com> (last visited Oct. 22, 2002); Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (codified at 15 U.S.C. § 7001-7233 (2002)). They establish that, with certain exceptions, electronic signatures and electronic documents have the same legal force and effect as traditional signatures and paper documents. They also provide broad definitions for electronic record authentication, validating everything from a simple mouse click to complex encrypted digital signatures. Neither act, however, gives guidance on the formation of electronic contracts. See UETA Online, at <http://www.uctaonline.com> (last visited Oct. 22, 2002); Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (codified at 15 U.S.C. § 7001-7233 (2000)).

132. UCITA § 112(a), *reprinted in* WINN, *supra* note 17, § 5.08[C], at 5-55 (emphasis added).

133. See Wildasin, *supra* note 3, at 13.

134. See *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 246-47 (S.D.N.Y. 2000); see also *Pollstar v. Gigmania*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000).

contained language such as “By using this site you agree to be bound by the terms and conditions contained herein.”¹³⁵ In contrast, the other two courts concluded that the user must *explicitly* assent to the terms—not merely use the site—to indicate assent.¹³⁶ To better understand the courts’ reasoning, each decision will be discussed separately and in chronological order.

A. Ticketmaster Corp. v. Tickets.com, Inc.: *Refusing to Enforce a Browse-Wrap Agreement*

In *Ticketmaster Corp. v. Tickets.com, Inc.*,¹³⁷ an unpublished opinion, a federal district court in the Central District of California refused to enforce the plaintiff’s browse-wrap agreement because the defendant had not assented to be bound by its terms and conditions.¹³⁸ The plaintiff, Ticketmaster Corp., maintained a Web site where users could receive information about upcoming events and purchase tickets online.¹³⁹ Defendant Tickets.com used automated software to extract information from the plaintiff’s Web site about upcoming concerts and ticket vendor locations, change the data’s font and format, and post the data on its own Web site.¹⁴⁰ The primary source of information for the defendant’s online ticket clearing house was Ticketmaster’s Web site.¹⁴¹ Ticketmaster filed suit alleging that the defendant’s actions were a breach of contract because, among other things, Ticketmaster’s browse-wrap agreement prohibited using any of the information obtained from its site for commercial use.¹⁴²

Ticketmaster’s browse-wrap agreement consisted of a general statement that use of the site bound users to its terms and conditions.¹⁴³ Next to this statement was a link to the full text of the Web site’s terms and conditions.¹⁴⁴ Ticketmaster argued that the defendant should be

135. *Register.com*, 126 F. Supp. 2d at 248; *Pollstar*, 170 F. Supp. 2d at 981.

136. See *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 596 (S.D.N.Y. 2001); see also *Ticketmaster Corp. v. Tickets.Com, Inc.*, No. CV99-7654-HLH (BQRx), 2000 U.S. Dist. LEXIS 12987, at *18 (C.D. Cal. Aug. 10, 2000), *aff’d*, 248 F.3d 1173 (9th Cir. 2001).

137. No. CV99-7654-HLH (BQRx), 2000 U.S. Dist. LEXIS 12987 (C.D. Cal. Aug. 10, 2000), *aff’d*, 248 F.3d 1173 (9th Cir. 2001).

138. *Id.* at *18.

139. *Id.* at *4–5.

140. *Id.* at *8–9.

141. See *id.*

142. See *id.* at *11.

143. *Id.* at *6.

144. *Id.*

bound by the terms contained therein.¹⁴⁵ The court disagreed, stating that Ticketmaster “lacks sufficient proof of agreement by defendant to be taken seriously”¹⁴⁶ However, the court did not provide further explanation or analysis. The court noted its unfamiliarity with concepts such as automated software.¹⁴⁷ The court also noted that a user on plaintiff’s Web site was not required to click an “I agree” icon before using the site,¹⁴⁸ but it did not elaborate on the significance of such an act.¹⁴⁹

B. Pollstar v. Gigmania, Ltd.: A Browse-Wrap Agreement May Be Enforceable

Although the facts of *Pollstar v. Gigmania, Ltd.*¹⁵⁰ were similar to those in *Ticketmaster*, the federal district court in the Eastern District of California considering the case was hesitant to reach the same result.¹⁵¹ Plaintiff Pollstar alleged that defendant Gigmania breached its browse-wrap agreement when Gigmania accessed Pollstar’s Web site, copied information, and posted it on its own Web site.¹⁵² Pollstar’s Web site contained a notice stating that if users accessed any of the information on the site, they agreed to be bound by the terms and conditions posted on the site.¹⁵³ This notice, which was in small gray text on a light gray background, provided a link to the full text of the Web site’s terms and conditions.¹⁵⁴ However, the link was not underlined, which is a common method of indicating an Internet link within a Web site’s text.¹⁵⁵ Like Ticketmaster’s browse-wrap agreement, Pollstar’s browse-wrap

145. *See id.* at *7–8.

146. *Id.* at *18.

147. *Id.* at *8 (“[Tickets.com] does not obtain the information in the same way as does the public (that is, by opening up an interior Web page and reading the information off the screen), but rather by a sophisticated computer method of monitoring the thousands of interior [Ticketmaster] Web pages electronically by the use of a mysterious (to the court) device[] know[n] as [] ‘webcrawlers’ or ‘spiders.’”).

148. *Id.* at *6.

149. The court provided a more detailed analysis of Ticketmaster’s copyright claim, which the court concluded was not valid because factual information may not be copyrighted. *See id.* at *9–10.

150. 170 F. Supp. 2d 974 (E.D. Cal. 2000).

151. *Id.* at 982.

152. *Id.* at 976.

153. *Id.* at 977.

154. *Id.* at 980–81.

155. *Id.* at 981.

prohibited use of information obtained from the site for commercial purposes.¹⁵⁶

Gigmania moved for dismissal, arguing that the browse-wrap agreement was unenforceable because users of Pollstar's Web site did not have adequate notice of its terms and conditions.¹⁵⁷ The court denied Gigmania's motion and stated that it found the reasoning of *ProCD* and *Hill v. Gateway 2000, Inc.*¹⁵⁸ persuasive.¹⁵⁹ In both *ProCD* and *Hill*, courts enforced shrink-wrap agreements based on the proposition in UCC § 2-204 that parties may form an enforceable contract in any manner sufficient to show agreement.¹⁶⁰ Expressly reserving judgment on the enforceability of browse-wrap agreements, the *Gigmania* court stated that it hesitated to declare browse-wrap agreements unenforceable because decisions within the Seventh Circuit, such as *ProCD* and *Hill*, demonstrated that users can be bound by terms they did not see.¹⁶¹ Although the court denied Gigmania's motion to dismiss and recognized the potential validity of browse-wrap agreements, it expressed concern that users of Pollstar's Web site may not be aware of the terms because notice of the license agreement was in small gray text on a light gray background and the link to the terms was not underlined.¹⁶²

C. *Register.com, Inc. v. Verio, Inc.: Enforcing a Term Within a Browse-Wrap Agreement*

In *Register.com, Inc. v. Verio, Inc.*,¹⁶³ a district court in the Southern District of New York was first to declare that browse-wrap agreements are enforceable as long as users receive clear notice of the terms.¹⁶⁴ Plaintiff Register.com, a registrar of Internet domain names, sought an injunction against defendant Verio, a competitor and Internet service provider,¹⁶⁵ for using automated software to access information on its Web site about its customers and compiling the information for mass

156. *Id.* at 976 n.1.

157. *Id.* at 980–81.

158. 105 F.3d 1147 (7th Cir. 1997).

159. *Pollstar*, 170 F. Supp. 2d at 981.

160. *See supra* notes 100–106 and accompanying text.

161. *Pollstar*, 170 F. Supp. 2d at 982.

162. *Id.* at 981.

163. 126 F. Supp. 2d 238 (S.D.N.Y. 2000).

164. *See id.* at 248.

165. *Id.* at 241.

marketing purposes, such as sending “spam.”¹⁶⁶ Register.com alleged that this process constituted a breach of contract because its Web site contained a browse-wrap agreement that prohibited commercial use of any information obtained from its site.¹⁶⁷ Like the Web sites at issue in *Ticketmaster* and *Pollstar*, Register.com’s Web site stated that using the site demonstrated assent to be bound by the terms and conditions of the agreement.¹⁶⁸

Register.com argued that the defendant had formed a contract when it submitted a query on Register.com’s database.¹⁶⁹ The defendant dismissed this argument by maintaining that merely submitting a query did not adequately indicate assent to the terms; an independent act demonstrating agreement to be bound by the terms of the browse-wrap was required.¹⁷⁰ The court agreed with Register.com that the “terms of use are clearly posted on [the] Web site. The conclusion of the terms paragraph states, ‘By submitting this query, you agree to abide by these terms.’”¹⁷¹ Therefore, the court concluded, “there can be no question that by proceeding to submit a . . . query, Verio manifested its assent to be bound by Register.com’s terms of use, and a contract was formed and subsequently breached.”¹⁷²

D. Specht v. Netscape Communications Corp.: Refusing to Enforce an Arbitration Clause in a Browse-Wrap Agreement

In *Specht v. Netscape Communications Corp.*,¹⁷³ a different federal district court in the Southern District of New York refused to enforce an arbitration clause within a browse-wrap agreement.¹⁷⁴ The plaintiffs, several individual consumers, filed a claim against defendants, Netscape and its parent company, America Online.¹⁷⁵ The consumers alleged that the defendants’ SmartDownload software transmitted private information about their Internet activity to the defendants in violation of the Electronic Communications and Privacy Act and the Computer Fraud

166. See *id.* at 244. “Spam” refers to unsolicited emails, the online equivalent to junk mail. For a discussion of spam, see WINN, *supra* note 17, § 2.06, at 2-37–2-40.

167. See *Register.com*, 126 F. Supp. at 245–48.

168. *Id.* at 248.

169. *Id.* at 245–46.

170. *Id.* at 248.

171. *Id.*

172. *Id.*

173. 150 F. Supp. 2d 585 (S.D.N.Y. 2001).

174. See *id.* at 596.

175. *Id.* at 587 n.2, 587–88.

and Abuse Act.¹⁷⁶ Pursuant to the arbitration clause in the browse-wrap agreement, the defendants sought to stay the proceedings and compel arbitration.¹⁷⁷ The court held that the plaintiffs were not bound by the terms of the browse-wrap agreement because they never affirmatively assented to its terms.¹⁷⁸

The software at issue in *Specht* was available on the defendants' Web site, where users like the plaintiffs could download it for free by clicking on an icon that said, "Download."¹⁷⁹ At the bottom of the Web page was the statement "Please review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software."¹⁸⁰ This statement could only be seen by scrolling down the Web page past the "Download" icon.¹⁸¹ The statement contained an underlined hyperlink to the defendants' full text of terms and conditions.¹⁸² The full text contained a notice in all capital letters stating that, if users did not agree to be bound by the terms, they must not download the software.¹⁸³

Distinguishing the enforceability of click-wrap agreements from the defendants' browse-wrap agreement, the court stated that the defendants' terms would have been enforceable merely by requiring users to click an "I Assent" icon or something similar before they may download the software.¹⁸⁴ Unlike browse-wraps, the court noted, click-wraps *require* users to click their assent to the terms before they may proceed with an activity on a Web site.¹⁸⁵ The court rejected the defendants' argument that clicking "Download" indicated assent in the same way that clicking "I Assent" does.¹⁸⁶ The court explained that downloading is "hardly an unambiguous indication of assent."¹⁸⁷ Rather, the purpose of downloading is to obtain a product.¹⁸⁸ However, "clicking on an icon stating 'I assent' has no meaning or purpose other than to indicate such

176. *Id.* at 587.

177. *See id.* at 598.

178. *Id.* at 596.

179. *Id.* at 588.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 595.

185. *Id.* at 596.

186. *Id.*

187. *Id.* at 595.

188. *Id.*

assent.”¹⁸⁹ The court concluded that “Netscape’s failure to require users of SmartDownload to indicate assent to its license as a precondition to downloading and using its software is fatal to its argument that a contract has been formed.”¹⁹⁰

The *Specht* court was also troubled that users were not required to link to the page displaying the full text of terms and conditions before proceeding with the download.¹⁹¹ Citing *ProCD*,¹⁹² the defendants argued that users who downloaded their software were bound by their terms regardless of whether they actually read them; just as those who buy products containing shrink-wrap agreements are bound by the terms of the shrink-wrap agreements regardless of whether they actually read them.¹⁹³ The court rejected this argument, distinguishing defendants’ terms from terms within shrink-wraps, because “shrink-wrap agreement[s] . . . require users to perform an affirmative action unambiguously expressing assent *before* they may use the software.”¹⁹⁴ Accordingly, the court held that users are not bound by electronic contracts unless they affirmatively indicate their assent.¹⁹⁵

IV. COURTS SHOULD ONLY ENFORCE ONLINE CONTRACTS THAT PROVIDE USERS WITH ADEQUATE NOTICE AND REQUIRE AFFIRMATIVE ASSENT

Considering the countless number of Web sites that are purportedly governed by browse-wrap agreements,¹⁹⁶ courts must come to a consensus regarding their enforceability. Courts should not enforce browse-wrap agreements because they do not satisfy the requirements necessary to create a valid contract, such as notice and assent. Online contracts should only be enforced where users have adequate notice of the terms and conditions of the contract and affirmatively agree to be bound by such terms. Accordingly, courts should enforce click-wrap agreements, assuming that the terms invoked are conscionable, because they provide users with adequate notice and require them to affirmatively assent to their terms.

189. *Id.*

190. *Id.*

191. *Id.* at 596.

192. 86 F.3d 1447 (7th Cir. 1996).

193. See *Specht*, 150 F. Supp. 2d at 595–96, 596 n.14.

194. *Id.* at 595.

195. *Id.*

196. See Wildasin, *supra* note 3, at 13.

A. *A Uniform Consensus Regarding the Enforceability of Browse-Wrap Agreements is Needed*

The four courts to date that have addressed the enforceability of browse-wrap agreements have not provided consistent guidance on the issue, much less established a cohesive body of law. Both *Ticketmaster* and *Pollstar* fail to provide useful precedent on the enforceability of browse-wrap agreements. Although the *Specht* court and the *Register.com* court applied similar reasoning to determine whether the parties were able to adequately manifest their assent, they reached conflicting conclusions. Because browse-wrap agreements are used to govern the use of countless Web sites, businesses as well as consumers should know whether terms in such agreements are enforceable.

1. *Ticketmaster Corp. v. Tickets.com and Pollstar v. Gigmania Fail to Provide Useful Precedent*

Neither *Ticketmaster* nor *Pollstar* provide helpful precedent because the *Ticketmaster* court does not supply explicit analysis and the *Pollstar* court never reaches a definite conclusion regarding the enforceability of browse-wrap agreements. The *Ticketmaster* court addressed whether the browse-wrap agreement was a valid contract in one sentence: “The contract theory lacks sufficient proof of agreement by defendant to be taken seriously as a ground for preliminary injunction.”¹⁹⁷ The court failed to explain its reasoning or provide any further guidance on the issue.¹⁹⁸ The court’s admitted unfamiliarity with concepts such as automated software most likely contributed to its apparent issue-dodging.¹⁹⁹ Additionally, the court may have been satisfied with its conclusion based on copyright law that factual information may not be copyrighted.²⁰⁰ Therefore, even if the defendant was bound by Ticketmaster’s agreement, Ticketmaster still lacked a claim sufficient for a preliminary injunction because defendant obtained and posted factual information about upcoming concerts.²⁰¹ Regardless of the court’s reasons for skirting the browse-wrap enforceability issue, the single

197. *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV99-7654-HLH(BQRx), 2000 U.S. Dist. LEXIS 12987 at *18 (C.D. Cal. Aug. 10, 2000), *aff’d*, 248 F.3d 1173 (9th Cir. 2001).

198. However, the court did state that it did not intend to make any significant legal pronouncements. *Id.* at *4. Rather, the court stated, directives regarding areas of unsettled law such as the enforceability of browse-wrap agreements should come from the courts of appeals. *Id.*

199. *Id.* at *8; *see supra* note 147 and accompanying text.

200. *See Ticketmaster*, 2000 U.S. Dist. LEXIS 12987, at *9–10.

201. *Id.* at *9.

sentence that the court devotes to the issue does not establish useful authority.

Although the *Pollstar* court analyzed the enforceability of browse-wrap agreements more thoroughly than the *Ticketmaster* court, it reached an equally unsatisfying conclusion.²⁰² The *Pollstar* court merely stated that a browse-wrap agreement “may” be enforceable.²⁰³ The *Pollstar* court’s conclusion is most likely explained by the procedural posture of the case. Defendant Gigmania had moved for dismissal and the court was reluctant to dispose of Pollstar’s claims on an issue about which it was uncertain.²⁰⁴ Although the court expressly stated its concern that users may not have adequate notice of a browse-wrap agreement, the court did not make any pronouncements regarding their enforceability generally. The court explained its denial of defendant’s motion for dismissal by suggesting that plaintiff’s browse-wrap *may* be enforceable without actually deciding whether browse-wrap agreements *are* enforceable.²⁰⁵ Accordingly, *Pollstar*, like *Ticketmaster*, fails to provide useful authority.

2. *The Specht v. Netscape Communications Corp. and Register.com, Inc. v. Verio, Inc. Courts Employ Similar Reasoning but Reach Conflicting Conclusions*

Although both *Specht* and *Register.com* were decided by federal district courts in the Southern District of New York, the courts reached opposite conclusions. The courts’ significantly different decisions are most likely explained by the cases’ different facts. In *Register.com*, the term at issue prohibited users like the defendant from using information obtained from the Web site for the purposes of sending spam.²⁰⁶ This type of term is not inherently troubling. In fact, such a term is most likely appreciated by Register.com’s customers. In contrast, the term at issue in *Specht* was a mandatory arbitration clause.²⁰⁷ Courts are generally more cautious about enforcing clauses that waive adhering parties’ legal right to sue.²⁰⁸ Although such waivers are valid if executed appropriately, courts are reluctant to enforce them if it is questionable whether the

202. See *Pollstar v. Gigmania*, 170 F. Supp. 2d 974, 981–82 (E.D. Cal. 2000).

203. *Id.*

204. *Id.*

205. *Id.*

206. See *Register.com Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 242 (S.D.N.Y. 2000).

207. *Specht v. Netscape Communications Corp.* 150 F. Supp. 2d 585, 587 (S.D.N.Y. 2001).

208. See DAWSON, *supra* note 55, at 186.

adhering party agreed to be bound by such a clause.²⁰⁹ The term at issue in *Register.com* protected the public while the term at issue in *Specht* deprived the public of a legal right. This difference may explain the different outcomes by two federal district courts within the same district.

Further, the parties in *Specht* and *Register.com* were not equally sympathetic. In *Specht*, the parties arguing against enforcement were individual consumers filing suit against a major corporation that was trying to deny them their day in court.²¹⁰ In *Register.com*, the defendant was an online business that was allegedly surreptitiously obtaining e-mail addresses of unwitting online consumers from the database of an unwilling competitor for the purpose of clogging the consumers' inboxes with spam.²¹¹ Thus, although neither court noted these factual differences as the reason for its decision, these differences likely played an implicit role in the courts' analysis.

Both the *Specht* court and the *Register.com* court based their holdings on the adequacy of the parties' manifestation of assent.²¹² The *Specht* court justified its contrary conclusion by distinguishing the facts of *Register.com*.²¹³ But this attempted distinction is tenuous. The *Register.com* court found that clicking on the "Submit Query" button was an adequate indication of assent, whereas the *Specht* court found that clicking on the "Download" button was not an adequate indication of assent.²¹⁴ It should not matter that the buttons used different language, nor should it matter that the *Specht* court applied California law while the *Register.com* court applied New York law. Both opinions rest on whether a contract was formed between the parties and both states require mutual assent to form an enforceable contract.²¹⁵ Arguably, *Register.com*'s Web site contained clearer notice to its users that submitting a query bound them to the Web site's terms and conditions.²¹⁶ Yet it is doubtful that the *Specht* court would have enforced Netscape's arbitration clause if its Web site had contained the same language as *Register.com*'s Web site

209. *See id.*

210. *Specht*, 150 F. Supp. 2d at 587.

211. *Register.com*, 126 F. Supp. 2d at 241.

212. *See* Ryan J. Casamiquela, *Business Law: Contractual Assent and Enforceability in Cyberspace*, 17 BERKELEY TECH. L.J. 475, 484–85 (2002).

213. *Specht*, 150 F. Supp. 2d at 594 n.13.

214. *See* Casamiquela, *supra* note 212, at 484–85.

215. *See id.*

216. *Register.com*'s website stated that using the site bound the user to the terms and conditions of the site. *See Register.com*, 126 F. Supp. 2d at 242–43. By contrast, Netscape's notice asked the user to "please review" the terms and conditions. *See Specht*, 150 F. Supp. 2d at 588.

because the *Specht* court demanded explicit affirmative assent.²¹⁷ Merely submitting a query as the defendant did in *Register.com* does not meet this demand.²¹⁸ In sum, these four federal district court opinions—one of which is unpublished—do not provide useful guidance regarding the enforceability of browse-wrap agreements because they have distinguishable facts that arguably explain their conflicting conclusions.

B. Courts Should Not Enforce Browse-Wrap Agreements

Courts should refuse to enforce browse-wrap agreements because they do not satisfy the requirements necessary to create a valid contract.²¹⁹ Browse-wrap agreements do not necessarily give users adequate notice that merely using a Web site binds them to the terms and conditions of that site.²²⁰ Further, even if the Web site provides notice that such terms and conditions exist, users are not given the opportunity to adequately manifest their assent.²²¹ The *ProCD* court and other courts' conclusion that shrink-wrap and click-wrap agreements are generally enforceable is not applicable to browse-wrap agreements because browse-wrap agreements do not require users to affirmatively assent. Further, the manifestation of assent purportedly acceptable to create a browse-wrap agreement does not satisfy the standards for adequate manifestation of assent promulgated by UCITA. Finally, declaring browse-wrap agreements unenforceable will benefit online businesses by encouraging them to use other, more enforceable online contracts.

1. Browse-Wrap Agreements Fail to Provide Users with Sufficient Notice to Create an Enforceable Contract

Users often do not receive adequate notice that they are entering into a binding contract when they perform an act purportedly sufficient to bind them to a browse-wrap agreement.²²² The average consumer may not even realize that such terms governing Web sites exist.²²³ The notices intended to alert consumers that using a Web site binds them to the terms and conditions of the site are often located at the bottom of a Web page

217. *Specht*, 150 F. Supp. 2d at 595.

218. *See id.*

219. *See infra*, Part II.

220. *See Specht*, 150 F. Supp. 2d at 595.

221. *See id.*

222. *See Specht*, 150 F. Supp. 2d at 594 (citing *Pollstar v. Gigmania*, 170 F. Supp. 2d 974, 980–82 (E.D. Cal. 2000)).

223. *See Specht*, 150 F. Supp. 2d at 594.

where a user has to scroll down to see them. The notice may also be written in a color similar to the background color, like the Web site in *Pollstar*.²²⁴ In *Specht*, Netscape's notice was problematic because its statement asking the user to "please review" the terms of the software license before downloading the software was too mild an invitation to notify the user that a binding contract was being formed.²²⁵ A user may perform an act that the notice claims will bind the user to the site without actually ever seeing the notice, much less the text of the agreement's actual terms and conditions.²²⁶ There is nothing about submitting a query on a database or downloading free software that inherently alerts a user that a binding contract is being formed. Absent clear notice, users have no way of knowing that they are entering into a contract.²²⁷

Browse-wrap agreements do not provide users with adequate notice of their terms and conditions, and therefore should not be enforced. The common law requires that the terms of a contract be clear, unambiguous, and plainly visible.²²⁸ Binding a party to a contract of which the party had no knowledge contravenes traditional principles of contract law.²²⁹ Courts apply this principle to cases involving standardized form contracts.²³⁰ As in traditional contract law, there is an exception to the duty to read rule for terms that are not adequately called to the attention of the user.²³¹ Such terms are not enforceable.²³² Because it is unlikely that the terms and conditions of a browse-wrap agreement are adequately called to the attention of the user, or "plainly visible" as required to create an enforceable contract, the browse-wrap agreement should not be enforced.

Further, browse-wrap agreements fail to meet even the standards promulgated by UCITA regarding adequate notice of online terms and conditions. UCITA requires that users be given an opportunity to review the terms and conditions of an online contract before being bound.²³³ UCITA explicitly contrasts its example of an enforceable online agreement with an online contract "that places the terms and conditions

224. *Pollstar*, 170 F. Supp. 2d at 981.

225. *See Specht*, 150 F. Supp. 2d at 595–96.

226. *See id.*

227. *See id.*

228. *See FARNSWORTH, supra* note 25, § 7.8, at 454–55; *see also* CALAMARI & PERILLO, *supra* note 59, § 9.42, at 378–79.

229. *See infra* Part II.

230. *See* CALAMARI & PERILLO, *supra* note 59, § 9.42, at 378–79.

231. *See id.*

232. *See id.*

233. U.C.I.T.A. § 112, *reprinted in* WINN, *supra* note 17, § 6.02[A], at 6–8, n. 27.

of the agreement behind jumplinks labeled 'terms and conditions' or 'legal' and tucked unobtrusively at the bottom of the [web] page, where they are unlikely to be noticed by any but the most cautious or dilatory user."²³⁴ While UCITA does not mention browse-wrap agreements by name,²³⁵ the example UCITA provides of an online contract that does not give users adequate notice is indeed a browse-wrap agreement.

2. *Browse-Wrap Agreements Do Not Require Users to Adequately Manifest Their Assent*

Even if a Web site provides adequate notice of its terms and conditions, users can not adequately manifest their assent to a browse-wrap agreement. It is possible to create a Web site that provides ample notice to users that use of the site binds them to the terms and conditions governing the site. It is also possible to create clear, explicit interfaces that allow users to review the terms and conditions of an agreement.²³⁶ But adequate notice alone does not create an enforceable contract. Users must also manifest their assent to be bound by a browse-wrap agreement. Browse-wrap agreements are not enforceable because users are not required to affirmatively indicate their assent.

An adhering party must manifest assent to the terms and conditions of an agreement to create an enforceable contract.²³⁷ Although there are exceptions to this rule, they are generally not applicable to the creation of an enforceable standardized form contract.²³⁸ Failing to manifest assent to the terms and conditions of a standardized form contract could result in the invalidation of its terms.²³⁹ The *Specht* court, applying this principle to a browse-wrap agreement, stated:

The case law on software licensing has not eroded the importance of assent in contract formation. Mutual assent is the bedrock of any agreement to which the law will give force. Defendants' position [that downloading software when a notice states that such an act constitutes assent to the terms of the browse-wrap], if accepted,

234. WINN, *supra* note 17, § 6.02[A], at 6-8, n.28.

235. The term "browse-wrap" was not adopted until after UCITA was finalized by the NCCUSL in 1999. See, e.g., *Specht v. Netscape Communications Corp.* 150 F. Supp. 2d 585, 594 (S.D.N.Y. 2001) (E.D. Cal. 2000) (noting that the *Pollstar* court was the first court to use the term "browse-wrap" when it used the term on Oct. 27, 2000).

236. For example, a large window with the entire text of the terms and conditions inside may provide users with a reasonable opportunity to review the terms and conditions of the browse-wrap.

237. See FARNSWORTH, *supra* note 25, § 3.1, at 110.

238. See CALAMARI & PERILLO, *supra* note 59, § 9.43, at 382-83.

239. See *id.*

would so expand the definition of assent as to render it meaningless.²⁴⁰

According to the *Specht* court, assent to a browse-wrap agreement must be affirmative.²⁴¹

Although a user may subjectively intend to manifest assent to the terms and conditions of a browse-wrap agreement by downloading software or submitting a query, it does not follow that such an action objectively manifests assent. Users can not manifest assent to a browse-wrap agreement because there is no way for them to affirmatively assent.

Click-wrap agreements, by contrast, require users to affirmatively manifest assent. Courts should enforce conscionable terms and conditions contained in click-wrap agreements. Such contracts meet the contractual principles of notice and assent. Notice is inherently provided by the window that displays the “I Accept” and “I Do Not Accept” icons to the user. Click-wrap agreements require users to affirmatively indicate their assent by clicking on an icon. While such an act does not guarantee that users have read and understood all of the terms and conditions contained in the contract, the act is analogous to a user signing a paper standardized form contract.²⁴² Courts should enforce terms within click-wrap agreements because, like signing a paper contract, the user is notified that they are entering into a binding agreement and must indicate their assent before a contract is formed.

Users do not have an opportunity to manifest assent to browse-wrap agreements in the same way that they may manifest assent to shrink-wrap and click-wrap agreements. Although the *ProCD* court’s reasoning is arguably applicable to click-wrap agreements, it is not equally applicable to browse-wrap agreements. Users’ ability to assent to terms of shrink-wrap agreements is central to *ProCD*’s holding that such contracts are enforceable.²⁴³ Similarly, users’ ability to assent to click-wrap agreements is central to courts holding that such contracts are enforceable.²⁴⁴ Users are not given the same opportunity to assent to browse-wrap agreements.²⁴⁵ The court in *Specht v. Netscape* explained that “downloading is hardly an unambiguous indication of assent. The

240. *Specht v. Netscape Communication Corp.*, 150 F. Supp. 2d 585, 596 (S.D.N.Y. 2000).

241. *See id.*

242. The issue of whether such an act must be authenticated to ensure that an unauthorized person is not forming a contract on a user’s computer is beyond the scope of this Comment.

243. *ProCD v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996).

244. *See, e.g., Groff v America Online*, No. PC 97-0331, 1998 R.I. Super. LEXIS 46 (R.I. Super. May 27, 1998) *12–13.

245. *See Specht*, 150 F. Supp. 2d at 595.

primary purpose of downloading is to obtain a product, not to assent to an agreement.”²⁴⁶ Although a user may form a contract in any manner sufficient to show agreement, performing a Web site function does not objectively meet this requirement. Therefore, courts should not apply the reasoning of the *ProCD* court to hold that browse-wrap agreements enforceable because such contracts do not allow users to adequately manifest their assent.

In addition to failing to meet traditional contract law requirements for manifesting assent, browse-wrap agreements also fail to meet UCITA’s requirements for manifesting assent. For software contracts other than click-wraps, UCITA provides that a user has manifested assent “if that person either [1] authenticates a record or [2] *intentionally* engages in conduct with reason to know that the other party will infer assent from that conduct, *provided that person has knowledge of the contents of the record*, or was given a reasonable opportunity to review it.”²⁴⁷ Accordingly, a user may meet the first method of the UCITA test by electronically signing an online contract *or* engaging in some kind of *intentional* activity to manifest assent. A browse-wrap agreement does not require or even allow users to sign it. If it did, it would no longer be a browse-wrap agreement because it would involve affirmative assent.

In sum, under UCITA, a user must engage in intentional activity to manifest assent to a browse-wrap agreement. However, even if a court concludes that a user intentionally entered into a browse-wrap agreement by downloading software, for example, and therefore satisfied the first prong of the UCITA test, the user is still not bound unless he or she also satisfies the second prong of the UCITA test by either knowing the terms and conditions of the agreement or by having a reasonable opportunity to review them. Further, browse-wrap agreements do not provide users with a reasonable opportunity to review terms and conditions because a user does not necessarily even know that the terms are there. Therefore, the browse-wrap agreement should not be enforced under contract law principles and UCITA’s requirements for manifestation of assent.

246. *Id.*

247. U.C.I.T.A. § 112(a), (emphasis added), *reprinted in* WINN, *supra* note 17, § 5.08[C], at 5-55.

3. *Declaring Browse-Wrap Agreements Unenforceable Will
Encourage Online Businesses to Use Other, More Enforceable
Online Contracts and Protect Consumers*

If courts refuse to enforce browse-wrap agreements, the result will benefit online businesses as well as consumers. The current state of the law gives online businesses with browse-wrap agreements a fifty-fifty chance that their terms will be enforced. These odds are not high enough to justify such a large number of online businesses relying on browse-wrap agreements to uphold their terms and conditions. Online businesses would benefit from a definitive standard regarding the enforceability of such agreements.

Online businesses that currently employ browse-wrap agreements are at risk that courts will refuse to enforce their terms and conditions.²⁴⁸ Even if courts generally enforced terms and conditions within browse-wrap agreements, online businesses could still be at risk that certain terms would be invalidated on the grounds of unconscionability. Courts generally do not invalidate terms on such grounds unless they find both procedural and substantive unconscionability.²⁴⁹ Because users may not have had adequate notice of the terms of a browse-wrap, they could make a strong argument that the browse-wrap was procedurally unconscionable. Therefore, users would have a strong argument that a term denying their right to sue that they were unaware of is substantively unconscionable.²⁵⁰ Although businesses are always subject to a court invalidating a term on the grounds of unconscionability, the odds of that happening are much smaller if the parties had clear notice of the terms and agreed to them.²⁵¹

If courts refuse to enforce browse-wrap agreements, it will encourage online businesses to replace browse-wrap agreements with online contracts that require users to adequately manifest their assent. By using these contracts, online businesses will benefit because it will be more likely that the terms and conditions of their agreements will be enforced.

It can be argued that courts' refusal to enforce browse-wrap agreements could hurt online businesses. Studies show that the fewer steps Web sites require users to complete in a transaction, the more transactions that will be completed.²⁵² While this may be true, it is also

248. See *Specht*, 150 F. Supp. 2d at 596.

249. See FARNSWORTH, *supra* note 25, § 4.28, at 312.

250. See, e.g., *Specht*, 150 F. Supp. 2d at 596.

251. See FARNSWORTH, *supra* note 25, § 4.28, at 312–13.

252. See Ruthenberg, *supra* note 2, at 14 n.6.

true that online contracts formed without the user's clear assent could be invalidated, thereby eliminating the protections afforded to online businesses by such terms.²⁵³

Further, if courts refuse to enforce browse-wrap agreements, consumers will be protected from being bound by online terms and conditions of which they had no notice. Although it can be argued that adhering parties never truly assent to the terms and conditions of standardized form contracts, most standardized form contracts require users to at least take some affirmative action that recognizes the formation of a contract, such as signing a document.²⁵⁴ While parties may not explicitly assent to each term in a standardized form contract, they are at least aware that they are entering into a binding agreement. Courts should apply this same principle to online contracts.

VII. CONCLUSION

Enforcing the terms and conditions of a browse-wrap agreement against a consumer offends traditional principles of contract law, as well as modern principles that require parties to assent to standardized form contracts. Under contract law and UCITA, courts must ensure that users assent to online contracts. While, as Karl Llewellyn suggests, there may not be "true assent" to standardized form contracts, consumers must still assent to be bound; even if it is a "blanket assent" to the terms of a standardized form contract. Browse-wrap agreements stray too far from the basic contractual principles of notice and assent. Accordingly, they must not be enforced.

253. See FARNSWORTH, *supra* note 25, § 4.28, at 312.

254. See CALAMARI, *supra* note 59, § 9.43, at 383.